Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

ment; or if reserved from the operation of a conveyance, it must be in writing." If the court by the language above quoted meant to express an opinion upon the point involved in the principal case, such expression of opinion was a mere *dictum*. It is possible that the court may have had in mind when using this language, not the question here in issue, but only the question when a reservation of the crops in a deed is necessary, and the bearing upon the question of the Statute of Frauds. No adjudicated case has been found sustaining the position taken by the court in the principal case, and the doctrine therein laid down, while perhaps reasonable enough, yet would seem to be a departure from what has hitherto been regarded as the law, and more proper to be declared by the legislature than the courts.

MARSHALL D. EWELL.

Chicago, May 17th 1881.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF IOWA.[2]

SUPREME COURT OF KANSAS.[3]

COURT OF ERRORS AND APPEALS OF NEW JERSEY.[4]

SUPREME COURT OF RHODE ISLAND.[5]

SUPREME COURT OF VERMONT.[6]

SUPREME COURT OF WISCONSIN.[7]

ACCOUNT.

Statute of Limitations does not run against each Item of open Mutual Accounts.—Where there is an open, running, mutual account between two persons, each person does not have a separate cause of action for each separate item of the accounts: but only the person in whose favor there is a balance due on the account has a cause of action for such balance against the other. In such a case, the Statute of Limitations does not run against each item separately; but only against the balance due; and it will commence to run only from the time of making the last item rightfully credited, to the party against whom the balance is due; each item thus credited to the party against whom the balance is due, is a payment or part payment, not of any particular item against him, but of the balance due against him; and is, in one sense, a pay-

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1880. The cases will probably be reported in 13 Otto.

[2] From Hon. John S. Runnells, Reporter; to appear in 54 Iowa Reports.

[3] From A. M. F. Randolph, Esq., Reporter; to appear in 25 Kansas Reports.

[4] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 14 of his Reports.

[5] From Arnold Green, Esq., Reporter; to appear in 13 Rhode Island Reports.

[6] From Edwin F. Palmer, Esq., Reporter; to appear in 53 Vermont Reports.

[7] From Hon. O. M. Conover, Reporter; to appear in 52 Wis. Reports.

ment or part payment of every item rightfully charged against him in the whole account: *Waffle* v. *Short*, 25 Kans.

ACTION.

Payee may bring suit in his own name on Accepted Order.—W. gave a written order to the plaintiff for all that was due him, on the defendants, and it was accepted by them, by writing their names across the same. *Held*, on demurrer, that the payee could maintain an action in his own name, and recover of defendants whatever was due from them to W.: *Bacon* v. *Bates*, 53 Vt.

The giving of the order by W.; receiving and presenting it for acceptance by the plaintiff, and accepting it by the defendants, under the circumstances, completed a novation: *Id.*

When an order is given by one party, received and presented by another, and accepted by a third, the agreement of each party is a sufficient consideration for the agreement of every other party: *Id.*

The negotiability of the order was restricted, being for an uncertain amount; but this did not render it invalid, nor affect the payee's right to enforce the same: *Id.*

ACTS OF CONGRESS. See *Errors and Appeals.*

ADMIRALTY.

Limitation of Liability—Sect. 4283 *Rev. Stat.—When claim may be made—*56*th Admiralty Rule—How value of Vessel may be ascertained.*—The 56th Admiralty Rule does not preclude a party from claiming, after the trial of the cause, the limitation of liability provided for by sect. 4283 Revised Statutes: *N. Y. & Wilmington S. S. Co.* v. *Mount*, S. C. U. S., Oct. Term 1880.

But if such limitation is claimed after trial the matters adjudicated cannot be reopened or the due course of appeal prevented: *Id.*

Where the claim is made during the progress of the cause it is in the discretion of the court to require that evidence already taken shall be received and used in the limitation proceedings: *Id.*

The claim would be ineffectual as against a party if made after he had received satisfaction of his demand, but the omission to claim the limitation as to one does not preclude the owners from claiming it as to others suffering loss by the same collision: *Id.*

In certain cases of laches in making the claim, it ought not to be allowed except upon condition of compensating the other party for costs and expenses incurred by reason of the delay; *Id.*

The proper criterion of the owner's liability is not the value of the vessel at the time of collision, but the amount at which she is appraised or sold in the admiralty proceedings, or if surrendered, her value at the time of surrender: *Id.*

ARBITRATION.

Arbitrator—Judicial Acts—Civil Liability for.—The acts of arbitrators, though irregularly done, in all matters to which their jurisdiction extends, are performed in a judicial capacity; and an arbitrator cannot be held liable in a civil action for damages, for an award alleged to have been made by him fraudulently and corruptly: *Jones* v. *Brown*, 54 Iowa.

An action for damages cannot be maintained against arbitrators, for the filing of an award, after the order submitting the case to them has been superseded, and in contempt of a writ of injunction served upon them, such award being ineffectual for any purpose: *Id.*

ASSUMPSIT. See *Partnership.*

ATTACHMENT. See *United States Courts.*

AUCTION.

Duty of Auctioneer to pay over Proceeds of Sale—Liability of Sureties.—Paying over the proceeds of an auction sale to the person for whom he sells, is one of the official duties of an auctioneer: *Tripp* v. *Barton*, 13 R. I.

Hence, neglect so to pay over, constitutes a breach of a bond conditioned simply, that the auctioneer shall "well and faithfully perform all the duties of said office during his continuance therein:" *Id.*

An official bond need not follow the words of the statute, if it uses words of the same legal effect: *Id.*

BILL OF EXCEPTIONS. See *Errors and Appeals.*

BILLS AND NOTES. See *Witness.*

BOND. See *Auction.*

CONFLICT OF LAWS.

Note made by Husband and Wife in another State.—A. and B. his wife, made and delivered their negotiable promissory note to the plaintiff. The note was made in Massachusetts, where the parties resided, and was valid there. Suit on this note was brought in Rhode Island, the writ being served, on the husband by attaching his interest in the realty of his wife, on the wife by attaching her realty, and on both, by attaching the wife's share of an intestate estate in the hands of an administrator. Pending the suit, the husband was adjudged a bankrupt and subsequently died. *Held*, that the wife being legally incapable in Rhode Island to make a promissory note, the action against her could not be maintained. *Held, further*, that as in Rhode Island the husband must be made co-defendant with the wife, and there was in this case no service of the writ on the husband, the action was fatally defective: *Hayden* v. *Stone*, 13 R. I.

CONSTITUTIONAL LAW.

Members of Congress—Freedom of Speech and Debate—Extent of Exemption from Liability.—The exemption of members of Congress from liability for speech or debate, extends to the report of members of a committee in favor of punishing a witness for contempt; their expression of opinion that he was in contempt, and their vote as members of the house in favor of his imprisonment. Such exemption is a good defence in an action brought against them by the person imprisoned: *Kilbourn* v. *Thompson*, S. C. U. S., Oct. Term 1880.

Ex post facto.—A statute which purports to authorize the prosecution, trial and punishment of a person for an offence previously com-

mitted, and as to which all prosecution, trial and punishment were, at its passage, already barred according to pre-existing Statutes of Limitation, is unconstitutional and void: *Moore* v. *State*, 14 Vroom.

CONTEMPT.

Houses of Congress—Extent of Power to Punish for Contempt—Orders of, not conclusive.—The two houses of Congress do not possess the same general power of punishing for contempt, that is exercised by the houses of the English Parliament: *Kilbourn* v. *Thompson*, S. C. U. S. Oct. Term 1880.

Whether a power of punishing for contempt exists, as necessary to enable them to exercise their legislative functions, *quære? Id.*

No person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which the house has jurisdiction to inquire: *Id.*

In a suit for false imprisonment, where the defendant justifies under the process of either house of Congress, the resolution of such house and the warrant of its speaker are not conclusive, but its authority may be inquired into by the court: *Id.*

Anderson v. *Dunn*, 6 Wheaton 204, overruled: *Id.*

CONTRACT. See *Frauds, Statute of.*

CRIMINAL LAW. See *Evidence.*

Confession.—Confession in a legal sense is, in effect, an admission of something which proves, or tends to prove, that the party making it was *himself* connected with the alleged crime, in a criminal or questionable manner; hence, admissions which tend to criminate a third party, are not within the rules of law, that exclude confessions, induced by promises and hope of favor: *State* v. *Carr*, 53 Vt.

DAMAGES. See *Negligence; Replevin.*

DEBTOR AND CREDITOR. See *Husband and Wife; Sale.*

DEED.

Boundaries and Monuments.—In locating lands described in a conveyance, the fixed monuments are more to be relied on than the description of the courses and distances: *Kalbfleisch* v. *Standard Oil Co.*, 14 Vroom.

The fact that the government has established a fixed standard by which distances are to be measured, cannot affect this legal rule: *Id.*

ERRORS AND APPEALS. See *Receiver.*

Reference of Case to Referee in Circuit Court under State Practice—Doubt as to Right of Supreme Court to Review—Conclusiveness of Finding of Referee as to Facts—Presumption of Filing of Written Stipulation of Waiver of Jury—Bill of Exceptions—Exception to Overruling of a Number of Objections as a Whole—Acts of Congress of 1865 *and* 1872.—It is doubtful whether cases tried in the Circuit Courts by a referee in states where such a practice exists, can be reviewed in the Supreme Court. While under the Act of 1872 (Rev. Stat. 914) the practice in the Circuit Court must conform to that in the state courts, yet the

review of a case in the Supreme Court is regulated by the Acts of Congress and not by the laws of the state, and Congress has not provided for the review of cases decided by a referee: *Boogher* v. *New York Life Insurance Co.*, S. C. U. S, Oct. Term 1880.

Treating such a case, however, as if the trial before the referee was a trial by the court without a jury, the facts found by the referee and confirmed by the court, must be treated as conclusive and will not be reviewed: *Id.*

Although the record does not show the written stipulation of the waiver of a jury required by the Act of 1865 (Rev. Stat. 649, 700), yet if it appears that under the state practice the case could not have been referred without the written consent of the parties, the Appellate Court will assume that a written stipulation was filed: *Id.*

Where the exceptions to a referee's report are overruled as a whole, and one exception is taken to the action of the court overruling them, this exception will not be sustained if any one of the findings of the referee excepted to was correct: *Id.*

ESTOPPEL. See *Negotiable Instruments.*

EVIDENCE. See *Negligence.*

Admissions—Effect of in dispensing with Proof.—The admission, by a party to a suit, of the existence of an assessment under the provisions of a municipal charter authorizing such an assessment under certain circumstances and for certain purposes, will render unnecessary proof of the jurisdiction of the municipal corporation to make the assessment, or proof of its regularity: *Turrell* v. *City of Elizabeth*, 14 Vroom.

A plaintiff, whose success depends on the admission of evidence offered by defendant and which plaintiff does not except to, and who does not suffer a nonsuit, cannot complain that the court has made use of that evidence so far as it was favorable to defendant: *Id.*

Res gestæ—Declarations after the Occurrence.—W. alleged that P. assaulted him, while alone in his own house, with a musket, with intent to kill and rob him. P. was duly informed against, and on the trial of the criminal action the court admitted, over the objections of P., the declaration of W., made in the absence of P., three to five minutes after the transaction, to witnesses who ran to his assistance on hearing his cries of murder, that P. made an assault with a musket at the window, demanded his money, together with the words and acts of each other. *Held*, The declarations of W. were merely hearsay and therefore inadmissible: *State* v. *Pomeroy*, 25 Kans.

FRAUD. See *Sale.*

FRAUDS, STATUTE OF.

Parol Conveyance of Lands—Suit to Recover Consideration Paid—Right of Rescission—Tender.—H., knowing that certain lands were part of the estate of one T., deceased, and did not belong to F., who was the administrator of such estate, gave his note to F. for $500; and took from F., as such administrator, a receipt for the note, which further stated that such note, if paid, was to be in full payment of the purchase-money of said lands; and that a deed of them was to be made to H. or his assigns, as soon as leave could be obtained from the probate court; and

afterwards, he paid the note and cut from the lands the timber thereon, constituting a large part of their value. Some of T.'s heirs refused to join in a conveyance of the lands to H.; and the estate of T. was not settled when this action was brought. Without offering to rescind the contract, or surrender possession of the land, or pay the value of the timber taken therefrom, and without any demand and refusal of a conveyance, H. sues to recover the moneys so paid, as for a failure of the consideration: *Held*, that the action will not lie: *Hyslip* v. *French*, 52 Wis.

GUARANTEE.

When conditional must be Accepted and Guarantor notified of Acceptance.—A guaranty in the following terms, addressed to A.: "If H. contracts with you for lime and plaster to be used in court-house buildings in Providence, promising to pay your bills from moneys received by him for work done on said buildings, I will guarantee the faithful performance of such contract with you. J. G. B." is conditional, and B. was entitled to notice that the conditions were accepted: *King* v. *Batterson*, 13 R. I.

If the lime and plaster were in fact furnished, not by A. but by the plaintiffs K., the latter could not hold B. on his guaranty offered to A. nor could they maintain their action on the ground that A. was their agent: *Id.*

HUSBAND AND WIFE. See *Conflict of Laws.*

Ante-nuptial Agreement—Conveyance in Consideration of Marriage.—Rights of Creditor.—Marriage is in law a valuable consideration. In consideration of marriage a man may convey property to his intended wife, and this conveyance, if *bona fide* and of a reasonable amount of property, is good against both existing and subsequent creditors: *Nat. Ex. Bank* v. *Watson*, 13 R. I.

For an ante-nuptial settlement to be void as fraudulent upon the settlor's creditors both parties to the settlement must have been cognisant of the intended fraud: *Id.*

LANDLORD AND TENANT.

Liability of Tenant for Rent after Destruction by Fire—Rule where Real and Personal Property leased together.—Whether the doctrine of the common law, that, upon a covenant to pay rent in a lease of lands and buildings for a term of years, the rent may be recovered notwithstanding the total destruction by accidental fire of the buildings, is in force in this state, *quære? Whitaker* v. *Hawley*, 25 Kans.

Even if this common-law doctrine be in force, yet where by a single instrument real and personal property are leased for a gross rental, and the personalty is a substantial part of the leased property, upon a total destruction by accidental fire, the lessee is entitled to an abatement of the rent equal to the proportionate rental value of the personalty: *Id.*

Where a lease for a term of years in addition to a covenant to pay rent, contains a stipulation that the lessee shall insure all or a part of the leased property in a given amount for the benefit of the lessor, *held*, that the provision for insurance limits and qualifies the promise to pay rent, and that as the former becomes operative the latter ceases to have force: *Id.*

LIMITATIONS, STATUTE OF. See *Account.*

MALICIOUS PROSECUTION.

Justification under Civil Process—Want of Jurisdiction in Officer issuing Process.—In an action for false imprisonment the defendants justified by filing an answer, stating that the imprisonment for which the plaintiff brought his action was had under and by virtue of an order of arrest issued in a civil action by a justice of the peace. The defendants set forth in their answer a copy of the affidavit upon which the order of arrest was issued, and from this copy it appears that the affidavit did not state any one of the grounds required by the statute to be stated in an affidavit for an order of arrest; *held*, that the justification was not sufficient; that an affidavit for an order of arrest is jurisdictional in its character, and that where it does not state any one of the grounds required by the statute to be stated in an affidavit for an order of arrest, all proceedings afterward had under it, or by virtue thereof, or which are founded thereon, are void; *Hauss* v. *Kohlar*, 25 Kans.

MANDAMUS.

To Compel Levy of Tax—Dispute as to Validity of Debt.—On the hearing of an order to show cause why a peremptory *mandamus* should not issue in this case, to enforce the levy and collection of a tax to pay interest upon bonds of a city, the validity of the bonds was questioned by the city, and various questions, both of law and of material facts affecting their validity, were raised. *Held*, that it was error to grant the writ before the relator had established his right in an ordinary action at law: *State of Wisconsin ex rel. Pfister* v. *Mayor and Board of Aldermen of the City of Manitowoc*, 52 Wis.

MORTGAGE.

Foreclosure-Suit—Incumbrancer pendente lite—Not a Necessary Party.—Where pending a foreclosure-suit another creditor of the mortgagor brings suit and obtains a judgment, which is a lien on the equity of redemption, the mortgagee is not bound to make such creditor a party in order to cut off his interest, even though by operation of law the lien of the judgment bound the land from the first day of term at which the judgment was rendered, which day was prior to the commencement of the foreclosure proceedings. In such case the judgment-creditor is bound by the decree of foreclosure: *Stout* v. *Lye*, S. C. U. S., Oct. Term 1880.

MUNICIPAL CORPORATION. See *Mandamus.*

Taxation—Limit of—Judgment Debt—Construction of Charter.—A section of a city's charter provided that the city council should have power to levy taxes not exceeding one and one-half per cent. per annum of the taxable property. Another section empowered the courts, upon failure of the council to make provision for a debt, to make such decrees as might be necessary for levying taxes not exceeding one per cent. per annum until the debt was paid. *Held*, that the former section related only to the ordinary tax for the necessities of the city, and that notwithstanding the limit imposed by this section had been reached the courts could under the latter section decree the levy of a tax to pay a judg-

ment debt: *City of Louisiana* v. *United States, ex rel. Wood*, S. C. U. S., Oct. Term 1880.

NEGLIGENCE.

Leaving Horse unfastened—Hirer's Liability for Injuries to Horse—Damages—Evidence—Experts.—In action to recover damages of the hirer of a horse on account of negligence, the jury returned a general verdict against the defendant and found specially, that he was guilty of negligence in the care and management of the horse hired by him; that the horse was a safe one, but that he was notified by the plaintiff when he hired him that he was unsafe, and that his negligence consisted in his not having hold of the lines when he attempted to get into the buggy. *Held*, The case was properly committed to the decision of the jury, and the Supreme Court cannot say, under the circumstances, as a matter of law, that the defendant was not negligent: *Monroe* v. *Lattin*, 25 Kans.

It is the general rule, that witnesses must speak to facts, and that they are not allowed to give opinions, unless they are experts, and then only upon questions of science and skill: *Id.*

It is inadmissible to ask a witness as to his opinion, whether it would be negligence for the driver to leave a horse unhitched just long enough for him to get into the buggy, if the lines were upon the same side of the horse the driver intended to get in: *Id.*

An instruction that the damage to the buggy and harness would be the difference in the value of the property before the injury and after the repairs, with the reasonable cost of the repairs and value of use during repairs, *provided*, the damages did not exceed the value of the property, lays down a fair mode of measuring the damages. So, also, the difference in the value of a horse, injured by the negligence of another, before and after reasonable treatment for such injury, with the expense of the treatment and attendance, and value of the use of the animal during the treatment, all not to exceed the value of the animal, would furnish one rule for assessment of the damages sustained by the injury: *Id.*

Contributory Negligence—Case for the Jury.—Plaintiff went to defendant's railway station for the purpose of helping to carry a trunk for a friend, who was about to take passage on one of defendant's trains. Having bought a ticket, plaintiff and his friend took the trunk to a platform pointed out by the ticket agent. There was at that time no train in sight, but one was due and expected to arrive at any moment. The view of the track was unobstructed as far as the bridge about four hundred yards distant in the direction from which the train was to come. Plaintiff and his friend, carrying the trunk between them, were walking in the other direction along the platform when plaintiff was suddenly struck from behind and severely injured by the bumper of the engine drawing the expected train. The bumper projected eighteen inches over the platform, which was from five to eight feet wide. There were a number of other persons on the platform. The testimony was conflicting as to whether bell was rung or whistle sounded after the train passed through the bridge; but it tended to show that the grade from the bridge to the platform was an up-grade; that the engine was being run at an unusual rate of speed; that the engineer, after

crossing the bridge, saw the persons on the platform; that he saw plaintiff before he was struck, sounded the alarm-whistle and reversed the engine, but the brakes were not put down; that after being struck, plaintiff was carried about eight feet, when the engine stopped. *Held*, that on this testimony the trial court was warranted in submitting to the jury the question whether plaintiff was injured by his own fault or that of defendant: *Langan* v. *St. Louis Iron Mountain & Southern Railway Co.*, 72 Mo.

Negligence is not imputable to a person for failing to look out for danger when under the surrounding circumstances he had no reason to suspect any: *Id.*

Negotiable Instruments.

What not—County Warrants—Set-off—Estoppel.—A county warrant drawn by the clerk upon the treasurer, directing the latter to pay to the payee therein named a certain sum of money, is not a negotiable instrument, and the county may set-off against a *bona fide* purchaser for value a claim held by it against the payee: *Wall* v. *Monroe Co.*, S. C. U. S., Oct. Term 1880.

Nor is the county estopped in such case by the fact that the warrant is a re-issue to the payee in lieu of an original warrant surrendered by him, and that at the time of such re-issue the claim now set up as a defence was known to exist: *Id.*

Notice.

Party put on Inquiry must Inquire in proper Direction, and use due Diligence.—The record of a mortgage, with a general description of the indebtedness, is constructive notice; and sufficient to put all parties interested upon inquiry; and they must inquire in the proper quarter: *Passumpsic Savings Bank* v. *First Nat. Bank*, 53 Vt.

When one is put on inquiry, he is chargeable with notice of all facts that could be obtained by the exercise of reasonable diligence, prosecuting the inquiry in the right direction: *Id.*

But while this is so, and while a liberal rule has been adopted to give effect to such mortgages, from the necessity of the case, there must be some limit to the inquiry, which one is bound to make; and that limit is reasonable diligence: *Id.*

Courts have not attempted to lay down a general rule as to what would constitute reasonable inquiry. This must vary with the circumstances of each case; *Id.*

This mortgage was given to a retiring partner, to secure him against the liabilities of the partnership; and also for the "*balance which should be due him on the purchase of said property.*" Notes were given to the mortgagee, but were not described, except as above. The note in question was assigned to the orator. The company was composed of three members; one living in Connecticut, one in California, and the managing partner in this state. The defendant examined the records: and inquired of both the mortgagee and mortgagor (that is the one partner in this state) whether anything was due to the mortgagee for the purchase money, and was informed by both that it "was all paid;" and then took its mortgage. *Held*, that the second mortgage should prevail over the first: *Id.*

NUISANCE.

Liability for.—All persons who are concerned, directly or indirectly, in a public nuisance, such as the firing off of fireworks in a public street, are responsible for the injuries done to an innocent person: *Jenne* v. *Sutton*, 14 Vroom.

OFFICER. See *Replevin*.

PARTNERSHIP.

Assumpsit does not lie for Balance before Account Stated.—A. brought *assumpsit* against B., his former partner, for the balance of a copartnership account. The declaration did not allege an account stated, nor show that the firm debts had been fully paid and the firm property reduced to money. *Held*, on demurrer, that the action could not be maintained: *Dowling* v. *Clarke*, 13 R. I.

RAILROAD.

Receiver—Lien Holders not Parties.—The plaintiff filed a statement for a mechanic's lien upon a railroad; subsequently an action was brought against the railroad company by certain creditors in which a receiver was appointed to take charge of the property, and afterward, in the same action, certain indebtedness created by the receiver was declared a first lien upon the road, which was sold in payment thereof. *Held*, that the plaintiff was not represented in his character as a lien holder by the receiver, and that, not having been made a party to the action at any time, his lien was not divested by the sale: *Snow* v. *Winslow et al.*, 54 Iowa.

The receiver having been authorized by the court to build a considerable extension of the road, and in payment therefor to issue certificates which should be a first lien upon the entire line, it was held that, in the absence of a showing of some peculiar exigency which rendered the extension necessary to protect the rights of the parties in interest, the lien of the plaintiff would not be displaced by the indebtedness so created: *Id.*

Stacking Hay near Track.—Question of Contributory Negligence.—A person stacked his hay in a meadow one hundred and fifty to two hundred yards from a railroad track, and the sparks from a passing engine ignited the grass fifty-six feet from the track, and there was no obstacle to prevent the fire from reaching the hay through the dry grass, and nothing had been done to prevent it, and the hay was burned, and destroyed by the spreading of the fire, *Held*, whether the owner thereof was guilty of contributory negligence or not was a question of fact for the jury and not a question of law for the court to decide: *C. E. S. & G. Railroad Co.* v. *Owen*, 25 Kans.

RECEIVER. See *Railroad*.

Appeal by.—Leave of Court.—The allowance by the circuit justice of the appeal of a receiver is equivalent to leave by the court to the receiver to take the appeal: *Farlow* v. *Kelly*, S. C. U. S. October Term 1880.

Replevin.

Claim by Third Party—Protection of Writ to Officer.—In Rhode Island an officer holding a writ of replevin with the statutory bond will be protected in taking the property described from the defendant in the writ, and in delivering it to the plaintiff, notwithstanding third parties may claim the property. A. purchased certain personalty of B., mortgaged it to B., and kept it in a house occupied by himself. During the absence of A., the house was sold under a mortgage, and with the personalty passed into the possession of C. A. replevied the personalty from C., but while the officer was making an inventory of the personalty to deliver it under the writ to A., B. demanded it. B. had not been in possession of the personalty since its purchase by A., nor was C. an agent of B. The officer refused to comply with B.'s demand whereupon B. brought trover against A. and the officer. *Held*, that the action would not lie against the officer: *Curry* v. *Johnson*, 13 R. I.

Recovery on Bond—Measure of Damages.—Where grain taken on a writ of replevin was threshed and sold by the plaintiff, and upon the trial the ownership was found to be in the defendant, the measure of his recovery on plaintiff's bond was held to be the market value of the grain at the time of the trial, less the cost of threshing and marketing, it not appearing that the plaintiff had acted in bad faith in obtaining the writ: *Clement* v. *Duffy*, 54 Iowa.

Sale.

Conditional and Certain Payments—Failure of Vendee to Pay—Resumption of Possession by Vendor.—Where W. sells to F. a safe on credit, upon the condition that the title to the safe shall remain in W. until it shall be entirely paid for, and F. is to take possession of the safe, but if at any time he makes default in any payment, W. is then entitled to retake the possession of the safe, and F., after making one or two payments thereon, makes default in all other payments *Held*, that W. is entitled on demand to retake the possession of the property, without payment, or tendering back any portion of the amount which F. has paid to W.: *Fleck* v. *Warner*, 25 Kans.

Change of Possession—Debtor and Creditor—Fraud in Law—Proceedings in Bankruptcy not a Judicial Sale—Damages.—A sale is fraudulent in law, unless there is a change of possession; possession in the vendee, open, notorious and exclusive, that is, apparent and such as would indicate to an observer a change of ownership, exclusive, not joint; and if any of these requisites are wanting to the sale, the property is liable to attachment by the creditors of the vendor, notwithstanding the *bona fides* of the transaction: *Weeks* v. *Prescott*, 53 Vt.

When the purchaser of personal property acquires the title to the land on which it is situated, it is not necessary to remove it; but when he permits the vendor to remain upon the premises, and control the property, his title, and the notice given by the record, are insufficient to change the rule: *Id.*

During the pendency of bankruptcy proceedings, the creditors accepted the proposition of compromise, under the United States statute of 1874, and the property was sold by the owner by leave or order of court. *Held*, that it was not a *judicial* sale, and that the rule as to a change of possession applied: *Id.*

Here were two sales: 1st, from the vendor to his brother, and then by the vendee to a son of the vendor. The first sale was fraudulent in law; the second, both in law and in fact. *Held*, that the second vendee took only the rights of the first: *Id.*

It was a sale of an entire stock of goods commonly kept in a country store. The vendor remained in possession as agent of the vendee, selling and replenishing the stock with the avails of what was sold. *Held*, that the goods remaining of those originally purchased by the first vendee, were attachable; but those replaced, were not attachable on the debts of the vendor. A different rule would probably prevail, where the sale is fraudulent in fact: *Id.*

Taking a lease of the store in which the goods were situated, and having it recorded; the transfer of the policy of insurance to the vendee; opening new books of account; buying and having goods sent in the name of the vendee—these are facts that tend to show a sufficient possession. But, in the opinion of the court, they are outweighed by the facts, that the vendor continued in the control and management of the goods, apparently as before the sale; that the vendee continued to board in his father's (vendor's) family as before; that the goods remained in the same store, and that to a common observer the apparent possession did not indicate a different possession: *Id.*

SEDUCTION.

Right of Father to Recover.—A father may recover for loss of service of his infant daughter caused by her being gotten with an illegitimate child, notwithstanding she was not at the time actually in the service of the father (but in that of the defendant), if he still retained the legal right to reclaim such service: *Lavery* v. *Crooke*, 52 Wis.

While the cause of action in such a case is technically the loss of service, the jury are not confined to the actual pecuniary loss, but may award exemplary or punitory damages; and evidence is admissible to show the defendant's pecuniary condition: *Id.*

It is no objection to the maintenance of an action for seducing the plaintiff's daughter that defendant procured the sexual intercourse by force: *Id.*

TAXATION. See *Municipal Corporation.*

Tax Title—Evidence of Validity depends on Strict Compliance with Statutory Powers.—In New Jersey on *certiorari* brought in aid of an ejectment to review the proceedings on which a tax title is founded, the recitals in the certificate of sale are *prima facie* evidence of the facts recited: *Woodbridge* v. *State*, 14 Vroom.

The act relative to sales does not affect the title derived by virtue of the deed; it only changes the rule of evidence as to the manner of proving the facts required to constitute a valid sale. Consequently, on the hearing of a *certiorari* brought to review the proceedings on which a tax title is founded, the common-law rule applies that one who claims title under a tax sale, must show affirmatively, that the tax was duly assessed, and was a lien on the lands; and that the successive steps which led to the sale, were regularly taken. Such facts, if they do not appear by the proceedings returned with the writ, must be shown by the recitals in the certificate of sale or by proof *aliunde*: *Id.*

The power to sell lands for taxes is a naked power, and the validity

of the title derived from such a sale, depends upon a strict compliance with the directions of the statute. The *onus probandi* is upon the purchaser at such a sale; and he must show affirmatively, that everything has been done which the statute makes essential to the due execution of the power: *Id.*

Where the statute gives the power to sell to a particular officer, as, for instance, the chairman of the township committee, it must appear that the sale was in fact made by him, and at the time and place at which the sale was advertised to be made: *Id.*

UNITED STATES COURTS.

Suits against Non-residents— When Prohibited—Attachments—Sect. 739, *Rev. Stat.*—The prohibition of section 739, revised statutes, against the bringing of a suit in a Circuit Court, in any other state than that of which defendant is an inhabitant, or in which he is found at the time of serving the writ, applies to an attachment against defendant's property: *Ex parte Des Moines & Minneapolis Railroad Co.*, S. C. U. S., Oct. Term 1880.

The act dividing the district of Iowa into four divisions, and providing, that where defendant is not a resident of the district, suit may be brought in any division where his property may be found, applies only to suits which may be properly brought against a non-resident, such as local suits, and suits where the defendant is found in the division when served with process: *Id.*

USURY.

When may be recovered back.—Usury paid on a note, not included in it, nor endorsed on it, may be recovered back by the payer, although the note has passed into a judgment; and a plea setting up such facts is held insufficient on demurrer: *McDonald* v. *Smith*, 53 Vt.

And this is so, while it is true, as decided in *Day* v. *Cummings*, 19 Vt. 496, that, when the usury is included in the note, and judgment has been rendered on it, it cannot be recovered back: *Id.*

The party paying the usury can plead it in offset; but his neglect to do so, is no bar to his recovering it in an independent suit: *Id.*

Where usury has been paid on a mortgage note, and the mortgage has been foreclosed, and the usury was deducted on the making of the decree, although this was done at the instance of an attaching creditor, while the payer of the usury (the plaintiff in this suit) protested against such deduction, such usury cannot be recovered; and a plea alleging such facts, on demurrer, is held sufficient: *Id.*

WATERS AND WATERCOURSES.

Running Stream—Action for Disturbing a Water Right.—Where an action is brought for diverting the sources of a running stream, which are on the land of a third party, who allowed the defendant to lay an aqueduct to them, the court charged the jury: "That if there was a brook, that had been accustomed to flow from the swamps on the land of Rice, through or upon the lands of others, and such brook was in character, permanent and constant, in usual and ordinary seasons, then Rice had no right to divert the water from such stream, or diminish the quantity of water accustomed to run in the channel of such stream, except such as might be incident to the proper husbandry of such farm.

But if the swamp or marsh on Rice's land was made by water oozing from the surrounding hills, which generally was wholly absorbed by the marsh, and that water only flowed from the basin or marsh, in times of excessive rains, or melting snow, then the plaintiffs would have no right of action against Rice, or those acting under him, for draining the water from the swamp in any proper manner, and would have no claim for nominal damages." *Held*, no error: *Boynton* v. *Gilman*, 53 Vt.

Subterranean Waters—Right to Use is Subject to Restriction not to Interfere with Natural Surface Stream.—S. is the owner of certain mills built on his own land on the banks of the Cottonwood. These mills are propelled exclusively by water-power obtained by means of a dam across the river. S. purchased in 1860 the right of flowage of the upper riparian owner, built the dam on his own lands, and has been in quiet and undisturbed possession for nineteen years. In this property he has invested many thousands of dollars. In 1880, the city of Emporia constructed a system of waterworks for the purpose of supplying the citizens with water for domestic use, for extinguishing fires, and for manufacturing purposes. It purchased a tract of land on the banks of the pond above the dam, dug a well twenty-five feet in diameter and twenty-six feet deep on its own land, and from seventy-five to a hundred feet from the bank of the pond. This well draws its supply of water from the pond by percolation through a bed of gravel at the bottom of the well. It sank one pipe into the well and another it extended directly into the pond. By means of engines and pumps it supplies the citizens from the well with all water needed for ordinary purposes, and intends to use the pipe in the pond only in case of fire. No condemnation of the water was had, and no compensation made to S. The supply of water in the river is at certain seasons of the year inadequate for the running of the mills, and S. is then forced to suspend work and let them stand idle. *Held*, that S. is entitled to an injunction restraining the city from taking water from the pond, either directly through the pipe extending into it, or indirectly by means of the well: *City of Emporia* v. *Soden*, 25 Kans.

While the general doctrine in respect to underground water percolating through the soil is unquestionably that the owner of the land may appropriate it to any use and in any amount, and without reference to the effect of such appropriation upon his neighbor's land or supply of water, yet it is limited to this extent that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of a riparian owner thereof: *Id.*

WITNESS.

Note—Payer not Competent after Death of Payee.—The payer of a negotiable note is not a witness to the fact of a payment, the note having been assigned subsequently, the payee being dead, and suit brought in the name of the assignee: *Farmers' Mutual Ins. Co.* v. *Wells*, 63 Vt.

When one party to a contract is dead, and the contract has been assigned, so that the estate, or heirs, have no interest in it, the assignee stands upon the proviso of s. 24, c. 36, Gen. Sts., in all cases where the contract is the cause of action, in issue and on trial, and the survivor cannot testify—otherwise where the contract is a matter collateral to the cause of action: *Id.*